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United States Court of Appeals,Ninth Circuit.
Aaron FLINT, Plaintiff-Appellant,
v.
George DENNISON, in his official capacity as President of the University of Montana-Missoula (UMT); Associated Students of the University of Montana (ASUM); Kyle Engelson, in his official capacity as the ASUM Elections Committee Chair; Justin Baker; Averiel Wolff; Sophia Alvarez; Anna Green; Kris Monson; Derek Duncan; Katie Boeckx, in their official capacities as Elections Commissioners for the Associated Students of UMT; Jessica Adam, Defendants-Appellees,
andGale Price, President; Vinnie Pavlish, ASUM Vice President; Cassie Morton, ASUM Business Manager, and ex-officio member of ASUM Senate; Bryce Bennett; Andrew Bissell; Brad Cederberg; Tyler Clairmont; Nezha Haddouch; Shawana Hagen; Chris Healow; Andrea Helling; Derf Johnson; Britta Padgham; Kimberly Pappas; Josh Peters; Rebecca Pettit; Jake Pipinich; Ross Properi; Jon Snodgrass; Leslie Venetz; Nathan Ziegler; Casey Hogue, in their official capacities as ASUM Senators, Defendant.
No. 05-35441.

Argued and Submitted Feb. 5, 2007.
Filed June 1, 2007.

I.

A.

The University of Montana is a public university under the Montana Constitution; it is administered through a Board of Regents. Mont. Const. art. X, § 2. The Board of Regents requires that the University's student government organization meet certain requirements. For instance, the student government must follow all Board policies, and the student government's constitution must be approved by the president of the University.

ASUM is the student government at the University of Montana. ASUM is a "representative body of the members of the Association, organized exclusively for educational and non-profit purposes." ASUM Const. art. 2, § 1, *available at* http:// www. umt. edu/ asum/ government/ constitution. htm. Under its constitution, ASUM's "primary ***821** responsibility ... is to serve as an advocate for the general welfare of the students." *Id.* ASUM "government and activities" must "comply with Montana State law and the policies of the Montana Board of Regents on Higher Education." *Id.* § 4. All students at the University registered for seven or more credits during the Fall and Spring semesters are assessed an activity fee, and each student who pays this fee is a member of ASUM. *Id.* art. 1, § 2.

ASUM not only serves to represent the students at the University but also provides hands-on, practical educational opportunities for University students. As explained by ASUM's senior faculty advisor,

ASUM offers students experience in many forms of leadership, through which they develop a variety of skills to handle the responsibilities that arise in student government. ASUM senators and executives learn how to address conflicting interests of diverse constituencies, how to make recommendations about the allocation of budgetary resources, how to negotiate with administrators over matters such as tuition and fee increases, and how to draft policies and priorities for numerous student programs.

Since ASUM's inception in 1906, the University has viewed ASUM as an invaluable educational tool for students of the University. ASUM exists, according to its senior faculty advisor, for "essentially educational purposes."

Consistent with its goals of representing the students at the University and providing students with leadership opportunities, ASUM allows for the election of three student executives and twenty student senators. ASUM Const. art. 4, § 1(a) Article 7 of the ASUM Constitution and Article 4 of the ASUM Bylaws impose several procedures and restrictions on the student election process. For example, only ASUM members, i.e., Student Activity Fee-paying students of the University, who maintain at least a 2.0 cumulative grade point average are eligible to run for elected office. *Id.* art. 7, § 1. Students must be registered for at least one credit to vote in any ASUM election. *Id.*

The ASUM Bylaws broadly regulate campaigning, which is defined as "any activity which directly or indirectly promotes the candidacy of one or more individuals for office." ASUM Bylaws art. V, § 2.A,

available at http:// www. umt. edu/ asum/ government/ bylaws. htm. The Bylaws provide that on campus campaign materials may be displayed only after the official campaigning period begins and only in certain areas. *Id.* §§ 2.B-C, 2.F.2-4. The Bylaws further prohibit any door-to-door campaigning in University residence halls or family housing and condition campaigning in a classroom on the permission of the professor. *Id.* § 2.E.

At issue in the case at bar is the Bylaws' campaign expenditure limitation: $100 for individual candidates for office. *Id.* § 2.G.1-3. The Bylaws require each student candidate to document and make public his expenditures two days prior to the general election. *Id.* § 2.H. ASUM reimburses candidates for a portion of their expenditures. *Id.* § 2.G.4. The Bylaws prescribe that all contributions to campaigns come from students; corporate and political action committee contributions are prohibited, as are contributions from ASUM-sponsored organizations. *Id.* § 2.G.5, I. As a means of enforcing these campaign regulations, the Bylaws provide that any candidate who violates the election rules may be barred from candidacy or denied office. *822

B.

With this general background in place, we turn to the facts of this case. Flint ran for and won election on a joint ticket with Gale Price as ASUM President and Vice-President, respectively, for the 2003-2004 academic year. Flint and Price combined to spend about $300 on their campaign and failed fully to disclose

these expenditures as required by the ASUM Bylaws. The ASUM Senate censured both Flint and Price for exceeding the campaign expenditure limit but allowed them to retain their offices as ASUM President and Vice-President.

The following year, Flint ran for a term as ASUM Senator and again exceeded ASUM's spending limit. Upon submitting his campaign expenditure form on April 26, 2004, in which Flint reported expenditures of $214.69, Flint was informed by ASUM Elections Chairman Kyle Engelson that Flint's name would be removed from the ballot for the upcoming election. Flint, then ASUM President, responded to Engelson's letter with an email in which he noted ASUM procedures require a two-thirds vote of the Senate approving Engelson's recommendation, which would not be possible until the election was already underway. Flint suggested that Engelson recommend to the Senate that candidates who violated ASUM election laws not be allowed to take office. After the election was underway, the ASUM Senate voted to remove Flint from his Senate seat should he win. Accordingly, after Flint received enough votes to be elected ASUM Senator, he was denied office.

Flint filed a complaint in United States District Court on May 5, 2004, under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution, claiming that the ASUM Bylaws's $100 spending cap on campaign expenditures was an unconstitutional abridgment of free speech. Flint sued George Dennison, in his official capacity as the University president; ASUM; Kyle Engelson, in his official capacity as ASUM Elections Committee Chair; and

seven ASUM Elections Committee Members in their official capacities. Flint later filed an amended verified complaint adding Gale Price, then ASUM President, two ASUM Executive Officers in their official capacities, and twenty ASUM Senators in their official capacities (collectively referred to hereinafter as "defendants").

Flint also filed a motion for a temporary restraining order, a motion for a preliminary injunction, and a motion to consolidate the preliminary injunction hearing with the trial on the merits. The district court denied Flint's motions. Before the court rendered its judgment as to Flint's motion for preliminary injunction, defendants filed a motion to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(b)(7). Following the court's denial of a preliminary injunction, Flint then filed an amended verified complaint to which the defendants again filed a 12(b)(1) and 12(b)(6) motion to dismiss. Thereupon, the district court issued an order to show cause regarding additional briefing and argument. Flint requested further briefing and argument to resolve the issue as to whether strict scrutiny [FN1] or rational relationship [FN2] applied to test the constitutionality ***823** of the campaign expenditure limitations. Defendants responded that additional briefing or argument was not needed and suggested that if the court chose to refer to matters outside the pleadings to resolve the 12(b) motion, the court should convert it to a Rule 56 motion for summary judgment based on the record developed in connection with the motion for preliminary injunction. The district court accepted defendants' suggestion and, applying a rational relationship standard to the spending cap, issued an order and opinion granting

summary judgment to defendants on March 28, 2005.

> FN1. Under a strict scrutiny analysis, government is required to show that its regulation of speech "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)
>
> FN2. Under a rational relationship analysis, government may regulate speech "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46, 103 S.Ct. 948.

Flint timely appealed that order. He claims that the district court applied the wrong legal standard in determining the constitutionality of ASUM's regulations. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

II.

Before turning to the merits of Flint's appeal, we first consider two threshold issues: whether Flint's claims are moot as a result of Flint's graduation from the University of Montana and whether the Eleventh Amendment immunizes defendants from Flint's suit.

A.

["Article III of the Constitution limits federal-court jurisdiction to Cases' and Controversies.'" *Massachusetts v. EPA*, ---U.S. ----, 127 S.Ct. 1438, 1452, 167 L.Ed.2d 248 (2007); *see also DaimlerChrysler Corp. v. Cuno*, --- U.S. ----, 126 S.Ct. 1854, 1860-61, 164 L.Ed.2d 589 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing 6633 so."). A case that "has lost its character as a present, live controversy" is moot and no longer presents a case or controversy amenable to federal court adjudication. *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir.1997); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (explaining that the mootness doctrine derives from the requirement of an Article III case or controversy). A cause of action is moot when the issues " are no longer "live" or the parties lack a legally cognizable interest in the outcome' " of the litigation. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (quoting *County of L.A. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979)). Mootness, however, is a flexible justiciability doctrine that allows review "if there are present effects that are legally significant." *Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir.2003); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (explaining that the Court's "cases demonstrate the flexible character of the Art. III mootness doctrine"). Where a court retains the ability to " fashion some form of meaningful relief " between the parties, an appeal is not moot, and the court retains jurisdiction. *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1000 (9th Cir.2004) (quoting

In re Pattullo, 271 F.3d 898, 901 (9th Cir.2001) (order)).

Here, although Flint filed his lawsuit prior to his graduation, we must consider whether Flint's 2004 graduation from the University of Montana renders his cause of action seeking declaratory and injunctive relief against defendants moot. *See* ***824** *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, --- U.S. ----, 127 S.Ct. 1484, 167 L.Ed.2d 225 (2007); *Clark v. City of Lakewood,* 259 F.3d 996, 1006 (9th Cir.2001) ("Mootness inquiries . . . require courts to look to changing circumstances that arise after the complaint is filed. . . ."). Generally, once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy, and his case is therefore moot. *See Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 798 (9th Cir.1999) (en banc). When a student's record contains negative information derived from allegedly unconstitutional school regulations, however, that information may jeopardize the student's future employment or college career. *Hatter v. L.A. City High Sch. Dist.*, 452 F.2d 673, 674 (9th Cir.1971). So long as a former student's record contains evidence of disciplinary sanctions, and the former student seeks "an order requiring school officials to expunge from school records all mention of the disciplinary action," the action is not moot. *Id.*

Here, Flint's amended complaint sought such an order of expungement. Flint sued for (1) a declaration that ASUM's limitation on campaign expenditures violated his free speech rights, (2) an injunction preventing ASUM from removing him from his elected position on

the ASUM Senate, and (3) an injunction ordering ASUM to remove from his record "all findings, proceedings, recommendations, and actions taken as a result of" the election code violations. Consequently, despite Flint's graduation from the University in 2004, his controversy remains "live" because of his third claim for relief. Given that mootness, unlike standing, is a flexible justiciability doctrine, *see Jacobus,* 338 F.3d at 1104, we retain the ability to grant relief in a legally significant way-to wit, ordering the expungement from Flint's record all evidence of his 2003 censure and the 2004 denial of his ASUM Senate seat. Such expungement is certainly a " form of meaningful relief.' " *Dream Palace,* 384 F.3d at 1000 (quoting *Pattullo,* 271 F.3d at 901).If we were to determine that Flint's First Amendment rights were violated, declaratory relief would require the University to expunge any and all records of Flint's censure and Senate seat denial; therefore, we hold that Flint's case is not rendered moot by his graduation.[FN3]

FN3. This case is distinguishable from *Students for a Conservative America v. Greenwood,* 378 F.3d 1129 (9th Cir.2004). There, we found the expungement exception inapplicable despite the students' request for expungement because the university did not keep records of election code violations. *Id.* at 1131. There was also no evidence in that case that the students were censured. In contrast, Flint was censured by ASUM, a school organization, in 2003 and denied his Senate seat in 2004 as is memorialized in ASUM Senate Meeting Minutes of April 28, 2004. Further evidence includes correspon-

dence memorializing Flint's violation of the spending limit in 2004 from Kyle Engelson on behalf of the ASUM Senate. Furthermore, neither in its briefing nor during oral argument has the University rebutted Flint's assertion that it keeps records of Flint's 2003 censure and 2004 Senate seat denial.

B.

Having determined that Flint's claims are not moot, we now consider whether defendants are entitled to immunity under the Eleventh Amendment. The Eleventh Amendment limits § 1983 claims such as Flint's. In *Will v. Michigan Department of State Police*, 491 U.S. 58, 70, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the Supreme Court held that "States or governmental entities that are considered arms of the State' for Eleventh Amendment purposes" are not "persons" under § 1983. Moreover, *Will* clarified that "a ***825** suit against a state official in his or her official capacity .... is no different from a suit against the State itself." *Id.* at 71, 109 S.Ct. 2304. We have held that a state university is an arm of the state entitled to Eleventh Amendment immunity. *See, e.g., Armstrong v. Meyers*, 964 F.2d 948, 949-50 (9th Cir.1992) (per curiam). Therefore, state officials sued in their official capacities, including university officials, are not "persons" within the meaning of § 1983 and are therefore generally entitled to Eleventh Amendment immunity.

Will recognized one vital exception to this general rule: When sued for prospective injunctive relief, a state official in his official capacity *is* considered a "person" for § 1983 purposes. *Will*, 491 U.S. at 71 n. 10, 109

S.Ct. 2304 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State.' " (quoting *Kentucky v. Graham,* 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985))). This exception recognizes the doctrine of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity. *See Rounds v. Or. State Bd. of Higher Educ.,* 166 F.3d 1032, 1036 (9th Cir.1999) ("*Ex Parte Young* provided a narrow exception to Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against unconstitutional actions taken by state officers in their official capacities."); *Doe v. Lawrence Livermore Nat'l Lab.,* 131 F.3d 836, 840 (9th Cir.1997) ("[T]he Eleventh Amendment allows only prospective injunctive relief to prevent an ongoing violation of federal law.").

Flint seeks declaratory and injunctive relief as related to past violations, namely, ASUM's allegedly unconstitutional infringement of his right to freedom of speech. However, as in *Doe v. Lawrence Livermore National Laboratory,* the relief Flint seeks is not so limited. In *Doe,* a contract university employee sought damages and reinstatement for breach of contract and a § 1983 violation after an alleged wrongful discharge. *Id.* at 837. The district court dismissed both claims as barred by the Eleventh Amendment, but we reversed the dismissal of the § 1983 claim, holding that reinstatement constitutes prospective injunctive relief because a wrongful discharge is a continuing violation. *Id.* at 841. Here, the injunctions Flint seeks as related to past

violations serve to expunge from University records the 2003 censure and 2004 denial of his Senate seat, which actions may cause Flint harm. Thus, the injunctions sought are not limited merely to past violations: they serve the purpose of preventing present and future harm to Flint. Therefore, they cannot be characterized solely as retroactive injunctive relief and are not barred by the Eleventh Amendment.[FN4]

> FN4. Because we ultimately hold that ASUM's campaign expenditure limitations do not violate the First Amendment and therefore affirm the district court's grant of summary judgment to all defendants, we need not consider defendants' argument that the student defendants are not state actors.

III.

Satisfied that this case presents a live legal controversy and that the Eleventh Amendment does not bar Flint's suit against defendants, we turn to the merits of Flint's claims. Because Flint appeals from the district court's order granting summary judgment in favor of defendants, we review de novo, viewing the facts in a ***826** light most favorable to Flint and drawing all reasonable inferences in his favor. *Scheuring v. Traylor Bros.*, 476 F.3d 781, 784 (9th Cir.2007). Because neither party disputes the relevant facts, our analysis is focused on application of the correct legal principles to the facts before us. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir.2002).

A.

The "speech" at issue in this case takes the form of a student candidate's spending during the election cycle for ASUM office. Because campaign expenditures implicate a student candidate's ability to convey his or her message to the University student body, the expenditures necessarily constitute "speech" and thus qualify for First Amendment protection. *See Austin v. Mich. Chamber of Commerce,* 494 U.S. 652, 657, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) ("Certainly, the use of funds to support a political candidate is speech'...."); *Buckley v. Valeo,* 424 U.S. 1, 19-20, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). There is no dispute in this case that *Buckley* and its progeny apply to the limited extent that they classify the student campaign expenditures as "speech" worthy of First Amendment protection.

That ASUM campaign expenditures constitute speech is not, however, the end of the matter. The speech at issue occurred in the University of Montana student election system, and, subject to constitutional limitations, government has the power to control speech in its school election system to preserve the character of that system. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). In *Cornelius,* the Supreme Court reaffirmed that when examining government speech limitations, we are to

examine the nature of the restriction: "[T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." 473 U.S. at 800, 105 S.Ct. 3439.[FN5]

> FN5. That the ASUM student election system "is a forum more in a metaphysical than in a spatial or geographic sense" does not affect our analysis because the Supreme Court has made clear that forum analysis is equally applicable to both spatial and metaphysical fora. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *see also Cornelius*, 473 U.S. at 800-02, 105 S.Ct. 3439 (rejecting contention "that a First Amendment forum necessarily consists of tangible government property" in applying forum analysis to a charitable contribution program); *Perry*, 460 U.S. at 46-47, 103 S.Ct. 948 (applying forum analysis to a school mail system) As more fully explained below, when the government opens a forum, such as a student election, the government retains the ability, within constitutional bounds, to limit the use of that forum to its intended purposes.

Here, both parties eschew forum analysis as the proper framework within which to analyze Flint's claim that the campaign expenditure limitation violates the First Amendment: Flint points to *Buckley* while defendants point to *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). We disagree on the one

point upon which the parties agree: their contention that traditional First Amendment analysis is inapplicable here. To demonstrate why we disagree, we briefly address each party's contention.

***827 B.**

1.

On the one hand, Flint vigorously asserts that student spending as part of the ASUM election is "political speech" that may be regulated only subject to strict scrutiny. Flint equates the ASUM student government to state and national government: "The role of the ASUM officers is no less important to society than is that of the Montana state government." Based on his equation of ASUM student leaders to elected political officials, Flint contends that *Buckley* is controlling and mandates that the ASUM campaign expenditure limitations be struck down as an unconstitutional limitation on speech. [FN6]

> FN6. In *Buckley,* the Supreme Court struck down portions of the Federal Election Campaign Act of 1971 that limited campaign expenditures on behalf of candidates in federal election campaigns on the ground that such limitations violated the First Amendment. 424 U.S. at 58-59, 96 S.Ct. 612. The Court held that the governmental interests advanced in support of expenditure limitations would need to satisfy strict scrutiny, and did not do so. *See id.* at

44-45, 96 S.Ct. 612.

Flint's arguments are unpersuasive. We may not simply ignore the facts that the campaign expenditure limitations in this case involved election to *student government* and that the expenditures occurred mostly, if not exclusively, on a *university campus.* The educational context of a university, the specific educational purpose of ASUM student government, and the numerous other limits placed upon student campaigning distinguish the campaign expenditure limitations in this case from those in cases such as *Buckley,* which involved campaigns for national political office. Furthermore, while ASUM undoubtedly has an impact on students at the University and has certain powers to distribute funds among student groups, it simply does not follow that ASUM is akin to a political government or that the ASUM election is the equivalent of a congressional race. The ubiquity with which political government is present to control facets of our lives is not-thank Heavens!-replicated by student government in students' lives.

The University uses ASUM primarily as an educational tool-a means to educate students on principles of representative government, parliamentary procedure, political compromise, and leadership. In contrast to participation in state or national politics, participation in ASUM student elections is limited to ASUM-enrolled University students-students must maintain at least a 2.0 grade point average to run for office and only students are allowed to vote in the election. Unlike state and national governments, ASUM is a creature of the Board of Regents, whose policy calls for ASUM's Constitution and conditions the

validity of the constitution on the University president's approval. Indeed, ASUM's entire operation is subject to the Board of Regents' policies and campus policies.

Thus, given the nature of this student organization and the environment in which it exists and operates, ASUM student officeholders are not the equivalent of elected political officeholders. As the Eleventh Circuit explained in a case dealing with similar campaign limitations for student government, "this is a university, whose primary purpose is *education,* not electioneering. Constitutional protections must be analyzed with due regard to that educational purpose, an approach that has been consistently adopted by the courts." *Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1346 (11th Cir.1989). We should not apply the principles of *Buckley* without first considering ***828** whether the university setting affects our First Amendment analysis. *See Widmar,* 454 U.S. at 267 n. 5, 102 S.Ct. 269. [FN7]

FN7. In *Welker v. Cicerone,* 174 F.Supp.2d 1055, 1065 (C.D.Cal.2001), a district court in our circuit addressed a similar campaign expenditure limitation on a university campus and held that *Buckley* was controlling because the court found no difference between a student election and a political election: "The court sees no reason to distinguish between applying *Buckley* to state political elections and political elections at state universities." We see the several differences detailed above between ASUM's elections and state and national political elec-

tions and therefore have no trouble making such a distinction.

2.

We likewise disagree with defendants' position, and that of the district court, that the university setting dictates that we must defer to all reasonable decisions imposed on student speech during the election process rather than first engaging in a forum analysis. Relying on passages in *Widmar* that public universities have the right to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study" and the right to "make academic judgments as to how best to allocate scarce resources," defendants assert that absent a showing of unreasonableness, the spending limits are *per se* constitutional because ASUM is an educational tool, and the University desires that leadership opportunities be available to as many students as possible. 454 U.S. at 276, 102 S.Ct. 269 (internal quotation marks omitted). We should defer, defendants contend, to their judgment in reasonably regulating speech regardless whether the regulation advances the purpose of the forum the University has provided for the speech.

We do not read the Supreme Court's cases to require such deference without first scrutinizing more carefully the nature of the student election forum and the government's interest in limiting speech within that forum. Although the Supreme Court in *Widmar* discussed the unique setting of a university campus, it also stressed that its "cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." 454 U.S. at 268-69,

102 S.Ct. 269. "The University's institutional mission, which it describes as providing a *secular* education to its students, does not exempt its actions from constitutional scrutiny." *Id.* at 268, 102 S.Ct. 269 (internal quotation marks and citation omitted). The Court looked to the nature of the property, explaining that the university in *Widmar* had "created a forum generally open for use by student groups" and therefore the university had "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267, 102 S.Ct. 269.

The Supreme Court has applied forum analysis in other, similar cases involving speech limitations on a university campus. In *Rosenberger v. Rector & Visitors of University of Virginia,* 515 U.S. 819, 828-30, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Supreme Court characterized a university student fund responsible for monetary reimbursements to student groups as a limited public forum. The Court then analyzed the student fund's denial of distributions to a university student religious group as viewpoint discrimination and subjected the denial to traditional First Amendment scrutiny. *Id.* at 830-37, 115 S.Ct. 2510.[FN8] Likewise, in ***829** *Board of Regents of University of Wisconsin System v. Southworth,* 529 U.S. 217, 229-35, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), the Supreme Court ruled that a university activity fee charged to students, which fee was used to facilitate extracurricular student speech, was constitutional so long as the university's funding support was viewpoint neutral.

FN8. Of further relevance in *Rosenberger* is the Court's clarification of *Widmar*. Specifically, the

Court explained that *Widmar*'s language regarding a university's freedom to make judgments as to allocation of scarce resources, language relied on by defendants here, is applicable to the university's own speech, but not to restrictions of third-party speech on a university campus:

> [In *Widmar*], in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." 454 U.S. at 270, 102 S.Ct. 269. The quoted language in *Widmar* was but a proper recognition of the principle that *when the State is the speaker, it may make content based choices.* ...
>
> It does not follow, however, and we did not suggest in *Widmar,* that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

515 U.S. at 833-34, 115 S.Ct. 2510 (emphasis added). We are presented in this case not with the speech of the University of Montana but with the speech of students involved in campaigning for student government. Here, it is Flint's spending of his own money that was regulated, not University funds or subsidies to Flint. Thus, contrary to defendants' assertions, *Widmar*'s reference to broad deference is not determinative.

In sum, we conclude that the constitutionality of the campaign expenditure limitation depends on the nature of the forum and whether the limitation on speech is a legitimate exercise of government power in preserving the character of the forum.[FN9]

FN9. Given that the speech at issue in this case is not "school-sponsored," *see supra* note 8, we need not consider whether the principles of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), apply with full force in a university setting-a question neither we, *see Brown v. Li*, 308 F.3d 939, 957 (9th Cir.2002) (Reinhardt, J., concurring in part and dissenting in part), nor the Supreme Court, *Hazelwood*, 484 U.S. at 273 n. 7, 108 S.Ct. 562, have definitively answered. Our sister circuits are split on the question. *Compare Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir.2001) (en banc), *and Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n. 6 (1st Cir.1989) ("*Hazelwood* ... is not applicable to college newspapers."), *with Hosty v. Carter*, 412 F.3d 731, 734-38 (7th Cir.2005) (en banc) (applying *Hazelwood* to university context), *and Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1346-47 (11th Cir.1989) (same). *Hazelwood* addressed whether a high school was required affirmatively to promote particular speech by allowing the speech's inclusion in a school newspaper. 484 U.S. at 266-74, 108 S.Ct. 562. Here, we are presented with student campaign speech in a forum opened by the University.

This is a scenario in which the University is not sponsoring, as in *Hazelwood,* any of the candidates' speech but is *allowing* the campaign-related speech.

We note that *Hazelwood* reinforces the conclusion that we must analyze the ASUM expenditure limitations within the confines of traditional forum analysis. In *Hazelwood,* the Supreme Court first determined that the high school student newspaper at issue was not a public forum for expression and concluded that in the specific setting of a high school, the school could "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562. Here, the University seeks to avoid the threshold question-namely, what type of forum is the ASUM election-and asks us to defer to its reasonable, educational related regulations. As shown, neither the Supreme Court's nor this court's precedents permit such avoidance.

IV.

A.

Although the student campaign expenditures constitute speech protected by the ***830** First Amendment, "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius,* 473 U.S. at 799, 105 S.Ct. 3439. Indeed, the Supreme Court has made

clear:
Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.... [T]he Government "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated...."

Id. at 799-800, 105 S.Ct. 3439 (citation omitted) (quoting *Greer v. Spock,* 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976)); *see also Faith Ctr. Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 906-07 (9th Cir.2007). Accordingly, we apply a forum analysis to determine when the government has legitimate interests in restricting the use of a forum to certain intended purposes that outweigh a speaker's interest in using the forum for a different purposes. *Cornelius,* 473 U.S. at 800, 105 S.Ct. 3439; *Faith Ctr.,* 480 F.3d at 907. "Forum analysis has traditionally divided government property into three categories: public fora, designated public fora, and nonpublic fora. Once the forum is identified, we determine whether restrictions on speech are justified by the requisite standard." *Faith Ctr.,* 480 F.3d at 907 (citation omitted).

On one end of the fora spectrum lies the traditional public forum, "places which by long tradition ... have been devoted to assembly and debate." *Perry,* 460 U.S. at 45, 103 S.Ct. 948; *accord Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998). Next on the spectrum is the

so-called designated public forum, which exists "[w]hen the government intentionally dedicates its property to expressive conduct." *Faith Ctr.*, 480 F.3d at 907. A designated public forum cannot exist in the absence of specific action on the part of the government. *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse."). A content-based restriction on speech in a public or designated public forum is subject to strict scrutiny, requiring the state to show a compelling interest in the restriction that is drawn narrowly to meet that interest. *Perry*, 460 U.S. at 45, 103 S.Ct. 948. A content-neutral time, place, and manner restriction is permissible so long as it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Id.*; *Faith Ctr.*, 480 F.3d at 907.

At the opposite end of the fora spectrum is the non-public forum. The non-public forum is "[a]ny public property that is not by tradition or designation a forum for public communication." *Faith Ctr.*, 480 F.3d at 907. We subject speech restrictions in a non-public forum to less-exacting judicial scrutiny: "[A]s long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view," the government may preserve the forum for its intended purposes. *Perry*, 460 U.S. at 46, 103 S.Ct. 948.

The government is not left with only the two options of maintaining a non-public forum or creating a designated public forum; if the government chooses to open

a non-public forum, the First Amendment allows the government to open the non-public forum for limited purposes. *831 The "limited public forum is a sub-category of a designated public forum that refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.' " *Hopper v. City of Pasco,* 241 F.3d 1067, 1074 (9th Cir.2001) (alteration in original) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 965 (9th Cir.1999)); *see also Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics."). But "[o]nce [a government] has opened a limited forum, ... [it] must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510. Specifically, the government "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum,' " *id.* (quoting *Cornelius,* 473 U.S. at 806, 105 S.Ct. 3439), "nor may [the government] discriminate against speech on the basis of its viewpoint," *id.; see also Faith Ctr.,* 480 F.3d at 907; *Cogswell v. City of Seattle,* 347 F.3d 809, 814 (9th Cir.2003).

B.

We conclude that the ASUM student election constitutes a limited public forum. While "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum," *Widmar,* 454 U.S. at 267 n. 5, 102 S.Ct. 269, the forum in this case is not the University of Montana campus. Rather,

because Flint challenges the limitations on speech within the confines of the ASUM election, whether the speech is delivered on campus or off, the relevant forum is the ASUM election itself, with its accompanying rules and regulations.[FN10] *See Cornelius,* 473 U.S. at 801, 105 S.Ct. 3439 ("[I]n defining the forum we have focused on the access sought by the speaker."); *DiLoreto,* 196 F.3d at 965 ("The relevant forum is defined by the access sought by the speaker."). Although the ASUM election "is a forum more in a metaphysical than in a spatial or geographic sense," the forum analysis outlined above is equally applicable. *Rosenberger,* 515 U.S. at 830, 115 S.Ct. 2510; *see supra* note 5.

> FN10. While the spending limit is found in the ASUM Bylaws, the limitation is nonetheless one imposed by the government on the forum. The University, as required by Board of Regents policy, has established ASUM as the associated student organization on the campus. Neither party disputes that the forum and the associated limitations are attributable to the University.

The ASUM election is not a traditional public forum: unlike parks and streets, it has not "by long tradition or by government fiat" been "devoted to assembly and debate." *Perry,* 460 U.S. at 45, 103 S.Ct. 948; *see also Forbes,* 523 U.S. at 678, 118 S.Ct. 1633 ("The Court has rejected the view that the traditional public forum status extends beyond its historic confines....").

The ASUM election also is not a designated public forum. "To create a forum of this type, the government must intend to make the property generally available

to a class of speakers." *Forbes,* 523 U.S. at 678, 118 S.Ct. 1633 (internal quotation marks and citation omitted). "[G]overnment does not create a public forum by inaction or by permitting *limited* discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius,* 473 U.S. at 802, 105 S.Ct. 3439 (emphasis added); *see also Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.,* 941 F.2d 817, 822 & n. 5 (9th Cir.1991) (en banc).

*832 Here, the ASUM election provides for the selection of students to govern student affairs; the election does not provide University installations for outsiders to showcase ideas in general.[FN11] Thus, the ASUM election exists to allow campaigns for student office and to elect student representatives to ASUM leadership positions in order to provide student candidates a valuable educational experience. The ASUM Bylaws define campaigning "as any activity which directly or indirectly promotes the candidacy of one or more individuals for an office," including a candidate's personal appearances, the posting or publishing of advertisements, distribution of literature, lobbying voters, and the buying of votes with money, gifts, or alcohol. ASUM Bylaws art. V, § 2.A. While the Bylaws do not limit the *content* of campaign speech, the Bylaws certainly do not permit students or the general public to use the ASUM election system indiscriminately. *See Perry,* 460 U.S. at 47, 103 S.Ct. 948.

> FN11. This is in contrast to *Widmar,* where the state university had "created a forum generally open for use by student groups," 454 U.S. at 267, 102 S.Ct. 269, by "routinely provid[ing] University facilities for the meetings of registered

> organizations," *id.* at 265, 102 S.Ct. 269. The ASUM election is akin, rather, to the forum in *Perry*. There, the Supreme Court rejected the contention that a school mail system was a designated public forum because "there [was] no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public." 460 U.S. at 47, 103 S.Ct. 948; *see also Forbes*, 523 U.S. at 680, 118 S.Ct. 1633 (holding that a candidate debate was not a designated public forum because the station broadcasting the debate "reserved eligibility for participation in the debate to candidates" and made "determinations as to which of the eligible candidates would participate in the debate").

Thus, a careful review of the ASUM Constitution and the ASUM Bylaws shows the University's purpose of opening a limited public forum, in the form of the ASUM elections. *See Faith Ctr.*, 480 F.3d at 908 n. 8 ("A limited public forum is a sub-category of the designated public forum, where the government opens a nonpublic forum but reserves access to it for only certain groups or categories of speech."); *Hopper*, 241 F.3d at 1074 (same); *DiLoreto*, 196 F.3d at 965 (same); *see also Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510; *Ala. Student Party*, 867 F.2d at 1353 (Tjoflat, J., dissenting) (noting that regulations governing campaigns for student government at a university created a limited public forum). For example, a student's ability to participate in the forum as a candidate is selective and the standards are clear. To run for office, a student must be registered for seven or more credits during the fall and spring semesters, pay a student

activity fee, and maintain at least a 2.0 cumulative grade point average. ASUM Const. art. 7, § 1. Only students registered for at least one credit are allowed to vote in the ASUM election. *Id.*

Furthermore, unmistakably clear standards govern campaigning within the forum. Under the ASUM Bylaws, campaign materials may be displayed only after the official campaigning period begins. *Id.* § 2.B. The Bylaws prohibit any door-to-door campaigning in University residence halls or family housing. Campaign speech may occur in a classroom only with the consent of the professor. *Id.* § 2.E. Posters may be placed in residence halls only with the approval of the residence hall office and in the University Center only with the approval of the University Center office. *Id.* § 2.F.2, 3. On the University campus itself, campaign materials may be posted only on kiosks. *Id.* § 2.F.4. And, of course, student candidates are not allowed to spend more than $100 promoting their campaign. There is nothing in the ASUM *833 Constitution or Bylaws, or the record before us, to suggest that these limitations, save the expenditure limitation, do not apply equally to all who participate in a student campaign, candidates and noncandidates alike. There is also no dispute that the University, through ASUM, applies these policies consistently. The spending limits have been in place since 1970, and Defendant Gale Price, who ran on a ticket with Flint in the 2003 election, was censured along with Flint for violating the spending limits. *See Hopper*, 241 F.3d at 1076 ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum.").

In summary, the restrictions on who may participate as a candidate or voter, and the regulations of the manner in which the campaign is conducted, together demonstrate that the ASUM election constitutes a limited public forum. This forum exists solely to allow campaigns for ASUM student office and the election of student representatives, thereby providing an educational experience for the student candidates and student voters.

C.

We now apply this framework to analyze the constitutionality of the campaign expenditure limitation. We must analyze whether the expenditure limitation is viewpoint neutral and reasonable given the purposes of the forum. *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510; *Faith Ctr.,* 480 F.3d at 907; *Cogswell,* 347 F.3d at 814. Because government "must respect the lawful boundaries it has itself set" in opening a limited public forum, any restriction on speech which is not viewpoint neutral or is unreasonable, fails constitutional scrutiny. *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510.

1.

Viewpoint neutrality is the requirement that government not favor one speaker's message over another's regarding the same topic. When "government has excluded perspectives on a subject matter otherwise permitted by the forum," the government is discriminating on the basis of viewpoint. *Faith Ctr.,* 480 F.3d at 912. If certain speech "fall[s] within an acceptable

subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell,* 347 F.3d at 815. The Supreme Court has been clear that viewpoint discrimination occurs when the government "denies access to a speaker *solely* to suppress the point of view he espouses on an otherwise includible subject." *Cornelius,* 473 U.S. at 806, 105 S.Ct. 3439 (emphasis added); *see also Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 971 (9th Cir.2002) (recognizing that "where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint"). "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger,* 515 U.S. at 828, 115 S.Ct. 2510.

There is no dispute in this case that the spending limit applies equally to all ASUM student candidates, as do all other campaign restrictions. The district court was presented no evidence showing that the University, through the spending limit, is attempting to suppress a particular point of view in the context of the ASUM election. Conversely, as evidenced by Gale Price's censure, the record demonstrates that the spending limit is applied equally to all student candidates, regardless of their views.

***834** This case stands in contrast to *Rosenberger* and *Good News Club v. Milford Central School,* 533 U.S. 98, 107-08, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), both of which involved viewpoint discrimination in a limited public forum. In *Rosenberger,* the Supreme Court found that by excluding funding to a student

religious group solely because the religious group promoted a particular religious perspective, the university was discriminating in a limited public forum on the basis of that group's viewpoint. 515 U.S. at 829-37, 115 S.Ct. 2510. Examining this holding in *Faith Center*, we explained that, "[b]ecause other student publications were free to discuss the topic of religion from a myriad of views other than the prohibited perspective, the University had discriminated on the basis of viewpoint." 480 F.3d at 913. Similarly, in *Good News Club*, the Supreme Court found viewpoint discrimination where a public school excluded a Christian club from meeting on the school's grounds while permitting nonreligious groups to meet at the school. 533 U.S. at 107-09, 121 S.Ct. 2093. The religious club sought only "to address a subject otherwise permitted [in] the [limited public forum], the teaching of morals and character, from a religious standpoint." *Id.* at 109, 121 S.Ct. 2093. Thus, exclusion of the religious group from the forum amounted to impermissible viewpoint discrimination.

Here, no evidence suggests that the University's desire to limit student candidate spending results from a desire to suppress any student's viewpoint or that the limitation in any way suppresses a particular candidate's viewpoint. The $100 limit does not apply solely to vegetarians, pacifists and Marxists, but not to meat-eaters, bellicists and fascists. Neither does the limit apply to candidates who might wish to abolish student government or at least intercollegiate athletics, but not to servile apple-polishers of the status quo or "jocks." Thus, the campaign expenditure limitation does not constitute viewpoint discrimination.

Flint's contentions do not persuade us to hold otherwise. Flint argues that the campaign expenditure limitation constitutes viewpoint discrimination because the limitation "[a]llow[s] noncandidate students, student associations and outside groups ... to speak with unlimited volume while limiting candidate speech."

The candidate/non-candidate distinction, however, is based on the *status* of the speaker, not on the speaker's viewpoint. The Supreme Court has held that in a non-public (or limited public) forum the government may "make distinctions in access on the basis of subject matter and *speaker identity*." *Perry,* 460 U.S. at 49, 103 S.Ct. 948 (holding that allowing different access based on the status of one union as the exclusive representative for the school district was not viewpoint discrimination because it distinguished based upon status, not particular views) (emphasis added); *see also Ariz. Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1009-10 (9th Cir.2003) (noting that a statute restricting the political speech of Political Action Committees but not candidates or other participants did not discriminate by viewpoint). Here, the spending limit is directed at the student candidates because they are the focus of the forum's purpose. Whether such focus is reasonable to achieve that purpose is our next inquiry.

2.

We are also satisfied that the candidate spending limit is reasonable. The reasonableness inquiry "focuses on whether the limitation is consistent with preserving

the property [here the ASUM election] for the purpose to which it is dedicated." *DiLoreto*, 196 F.3d at 967; *see also Perry*, 460 U.S. at 50-51, 103 S.Ct. 948. Reasonableness ***835** is not the legal equivalent of narrow tailoring or least restrictive means; indeed, the government's chosen method to preserve the character of a limited public forum "need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808, 105 S.Ct. 3439; *accord Cogswell*, 347 F.3d at 817 ("[T]here is no requirement that a restriction in a limited public forum be narrowly tailored or the government's interest be compelling for a restriction to be reasonable."). So long as the government can reasonably justify its regulation on speech in the limited public forum in light of the purposes of the forum, the regulation passes constitutional muster.

Since its inception, ASUM has been subject to the University of Montana's educational mission. ASUM's faculty advisor explained that ASUM exists for "essentially educational purposes." ASUM's Constitution declares that ASUM is "organized exclusively for educational and nonprofit purposes." ASUM Const. art. II, § 1. The election of student representatives to ASUM leadership positions is designed to help further the educational purpose of ASUM. The evidence before us clearly shows that the University views the spending limitation as vital to maintain the character of ASUM and its election process as an educational tool, rather than an ordinary political exercise. ASUM's senior faculty advisor explained that the spending limit was adopted in the revised ASUM Constitution of 1969-1970 "as a measure intended to defend ASUM against being steered away from its properly educational goals." The "primary intent" of the spending

limits is "to prevent student government's being diverted by interests other than ones educational." It is thus obvious that the purpose of imposing the spending limit on student candidates is to serve pedagogical interests in educating student leaders at the University.

We find that the spending limits reasonably serve this pedagogical aim. ASUM exists to teach students responsible leadership and behavior. Imposing limits on candidate spending requires student candidates to focus on desirable qualities such as the art of persuasion, public speaking, and answering questions face-to-face with one's potential constituents. Students are forced to campaign personally, wearing out their shoe-leather rather than wearing out a parent's-or an activist organization's-pocketbook. Our conclusion is supported by the declaration of Gale Price, former ASUM President:

Unlimited spending in ASUM elections also would change the nature of the election process as a learning experience. The spending limits mean that students have to figure out no-cost or low-cost ways of campaigning. They have to plan ahead to figure out their strategy, rather than just dumping a lot of money into advertising materials at the last minute. They have to make decisions about allocating their resources effectively. Without spending limits, the well-off students would not have to face these constraints or make these kinds of decisions in the course of running for ASUM.

The spending limitation is thus consistent with the purpose of the limited public forum in providing student leaders an educational experience as they campaign for, and are elected to, student government.

See DiLoreto, 196 F.3d at 967.[FN12]

> FN12. Flint contends that the expenditure limitation teaches students "that the First Amendment doesn't protect political speech [and] how not to conduct elections in a free society." Aside from its obvious hyperbole, this argument is not persuasive. So long as the purported educational goal of the expenditure limitation-here, a lesson in strategy, campaigning, and leadership-is reasonably capable of fruition, any additional "lessons" that students like Flint might learn do not affect the reasonableness, and thus the constitutionality, of ASUM's regulations. Furthermore, nothing in the First Amendment requires universities to set up student elections to mimic exactly political elections and political fund-raising. It is beyond dispute that government may impose reasonable, viewpoint neutral restrictions even on pure political speech in limited public forums. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678-83, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998); *Cogswell*, 347 F.3d at 814-18 (finding voter pamphlets a limited public forum and holding that a limitation on candidate's statements in voter pamphlets is viewpoint neutral and reasonable in light of the purpose of the forum).

Furthermore, it is reasonable for the University to confine this spending limitation to student candidates. Because the ***836** purpose of ASUM is to provide an educational experience to those students who actively

participate in the organization, it is reasonable for the University to limit the campaign expenditure limitation to student candidates. In *Perry*, where several teacher unions received different levels of access to a limited public forum, the Supreme Court explained that "[t]he differential access provided [the teacher unions] is reasonable because it is wholly consistent with the district's legitimate interest in preserv[ing] the property ... for the use to which it is lawfully dedicated.' " 460 U.S. at 50-51, 103 S.Ct. 948 (alterations in original) (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981)). Here too, applying the spending limitation only to candidates helps preserve the nature of the ASUM election as an educational experience for those students actively participating therein. Even if not the best or most effective means of providing the student candidates the educational experience that the University seeks to provide through the ASUM elections, we are confident the spending limits reasonably serve the purpose of the forum. *See Cornelius*, 473 U.S. at 808, 105 S.Ct. 3439. In a limited public forum, the First Amendment requires nothing more.

V.

By creating a student election process, the University of Montana has opened a limited public forum dedicated to allow campaigning for and election to leadership positions in student government. The University's purpose in opening such a forum is to provide student candidates and student voters a certain type of educational experience. We hold that imposing an expenditure limitation on student candidates is viewpoint

neutral and serves to effectuate the purpose of the ASUM elections. We therefore affirm the district court's summary judgment in favor of defendants.

AFFIRMED.

C.A.9 (Mont.),2007.
Flint v. Dennison
488 F.3d 816, 07 Cal. Daily Op. Serv. 6274, 2007 Daily Journal D.A.R. 8268

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United States District Court,D. Montana,
Missoula Division.
Aaron FLINT, Plaintiff,
v.
George DENNISON, in his official capacity as President of the University of Montana, et al., Defendants.
No. CV 04-85-M-DWM.

March 28, 2005.

ORDER
MOLLOY, Chief Judge

I. INTRODUCTION

Plaintiff, Aaron Flint, filed this case against the University of Montana's President, the Associated Students of the University of Montana ("ASUM") and ASUM's individual members (collectively "ASUM"). He challenges ASUM bylaws that cap candidate campaign expenditures for all offices at $100.00 per election. Flint took matters in his own hands and deliberately violated the duly enacted campaign limits. After twice violating ASUM's spending restrictions-once during his successful presidential campaign in 2003 and then again in 2004 while running for senate-and a subsequent ASUM resolution preventing Flint from assuming the senatorial seat to which he was elected, Flint now contends the restrictions violate his First Amendment free speech rights.

In May 2004, I denied Flint's request for a temporary restraining order and, in August, denied Flint's motion for a preliminary injunction. Subsequently, on October

8, 2004, this Court, pursuant to Fed.R.Civ.P. 12(b), converted Defendants' motion to dismiss for failure to state a claim to a Rule 56 motion for summary judgment. For the following reasoning, I am granting Defendants' motion for summary judgment.

II. FACTUAL BACKGROUND

To ensure all students enjoy equal access to the educational benefits available through student elections and governance, ASUM has imposed campaign finance restrictions since 1970. The student governing body chose to impose spending caps (currently set at $100.00 for all offices) and to reimburse candidates for the first $10.00 they spend participating in student electoral politics and one half of their subsequent expenditures up to the $100.00 limit. Consequently, where a student spends up to $100.00 campaigning, only $45.00 will come from the student's own resources. Absent these restrictions, ASUM believes students with financial resources not ordinarily typical ***1217** for most, will monopolize the competition for limited seats by purchasing increased visibility and name recognition. This is perceived as detrimental to the educational experience of participating in the student government.

When Flint filed this case, he was ASUM President. While campaigning for that position in 2003, he violated ASUM's spending bylaws. At that time, the cap was $175.00 for a president-vice president candidate team. Flint and his running mate, current ASUM President Gale Price, spent roughly $300.00 on their campaign. ASUM censured the duo during the 2003-04 academic year-Flint's presidential term. Apparently, Flint was dissatisfied with only being censured, so he

violated the rules a second time.

Flint again broke the spending rules. In spring 2004, Flint successfully ran for an ASUM senate post. During his campaign, Flint spent $214.69 despite the expenditure limit of $100.00. He didn't publicly run on a platform of deceit but he relied on financial prestidigitation to get elected. The assumption that he placed himself above ASUM's electoral rules on purpose is probably a fair [FN1] Flint disclosed his second campaign finance violation on April 26, 2004, the day before the polls opened. The ASUM senate met two days later and, pursuant to § 5 of Article V of the ASUM bylaws, voted to deny Flint his seat should he be elected. Flint responded by filing this action.

> FN1. Indeed, in response to a reporter's inquiry as to whether he would encourage others to contravene election rules by spending more than the $100.00 limit during the 2004 elections, Flint declared, "You're damn right I will." Curtis Wackerle, *ASUM President Opposes $100 Spending Limit,* Montana Kaiman (U. of Mont.) 5 (Mar. 16, 2004).

III. ANALYSIS

A. Summary Judgment Standards

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." A genuine issue of material fact exists if there is sufficient evidence favoring the non-moving party for a

reasonable jury to return a verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Once the moving party meets its burden, the non-movant must designate specific facts which show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Standard Applicable to Assess the Constitutionality of ASUM's Campaign Expenditure Limits on Student Candidates.

As this Court determined on August 20, 2004, the deferential standard of reasonableness applies to assess the constitutionality of ASUM's spending limits and not, as Flint urges, the strict scrutiny standard applied to campaign spending restrictions by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

State universities maintain the undeniable right to determine "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring)). This deference to academic judgments confers upon universities ***1218** a parallel right to ensure the quality and availability of educational opportunities, even where the exercise of that right results in the exclusion of First Amendment activities. *See id.* at 277, 102 S.Ct. 269.

Public university students' First Amendment rights " are not automatically coextensive with the rights of adults in other settings.' "*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)). Rather, those rights must be considered in "light of the special characteristics of the school environment." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Consequently, student speech in the school setting is amenable to greater restriction than speech in the general public. *See Bethel*, 478 U.S. at 682-85, 106 S.Ct. 3159.

As indicated by the Supreme Court, a deferential standard of reasonableness governs First Amendment challenges in the educational context. Indeed, the Constitution "permit[s] reasonable regulation of speech connected activities in carefully restricted circumstances."*Tinker*, 393 U.S. at 513, 89 S.Ct. 733 (1969). Undisputed is a "[u]niversity's right to exclude even First Amendment activities that violate reasonable campus rules,"*Widmar*, 454 U.S. at 277, 102 S.Ct. 269, and that schools may impose limits on school-related speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562. In *Hazelwood*, the Court upheld, against First Amendment challenges, a school official's decision to remove stories on controversial topics from the school paper. *Id.* at 276, 108 S.Ct. 562. The Court found that it could not reject as unreasonable the official's conclusion that the articles were not suitable for publication. *Id.* Similarly, in *Bethel*, the Court found school officials did not violate the First

Amendment by disciplining a high school student for using vulgar language during a school assembly. 478 U.S. at 682-85, 106 S.Ct. 3159. The Court deferred to the school's judgment that such speech, though acceptable in public, would "undermine the school's basic educational mission." *Id.* at 685, 106 S.Ct. 3159. Contrarily, the Court in *Tinker* found barring students from wearing armbands to protest the Vietnam war violative of free expression, noting that school officials did not reasonably fear the protest would disrupt school work or discipline. 393 U.S. at 513-14, 89 S.Ct. 733.

Here, Flint argues against the use of a reasonableness standard and, instead, asks the Court to impose the exacting scrutiny the Supreme Court applied to campaign spending restrictions in *Buckley*.The standard applied is dispositive in that the limit in question meets the former while it likely fails the latter. Flint relies on *Welker v. Cicerone*, 174 F.Supp.2d 1055 (C.D.Cal.2001), in which a federal district court, assessing the constitutionality of a similar university student government campaign spending limit, looked to *Buckley* as its basis for analysis. The *Welker* court noted *Buckley* was unequivocal in finding that "spending money in a political campaign directly affects freedom of speech," thus requiring the university to "demonstrate that their campaign expenditure restrictions serve a compelling interest and that they are narrowly tailored to effectuate the interest." *Welker*, 174 F.Supp.2d at 1064. While the court acknowledged in a footnote the "generally relaxed First ***1219** Amendment standard applicable to the college and university setting,"*Id.* at 1065 n. 6, it found "no reason to distinguish between applying *Buckley* to state

political elections and political elections at state universities." *Id.* at 1065.

I am not persuaded by the *Welker* court's reasoning. A significant basis exists for distinguishing the application of First Amendment principles in state or national political elections and in its application to student government elections at state universities. The Eleventh Circuit Court of Appeals explained this principle in *Alabama Student Party v. Student Government Association of the University of Alabama*, 867 F.2d 1344 (11th Cir.1989). There, university students challenged regulations adopted by the student government which (1) allowed distribution of campaign literature only during the three days prior to the election and only at select locations on campus; (2) banned the distribution of campaign literature on election day; and (3) allowed open forums or debates only during the week of the election. *Id.* at 1345. Following a survey of Supreme Court case law, the Eleventh Circuit chose to apply a reasonableness standard, finding that it "should honor the traditional reluctance to trench on the prerogatives of state and local educational institutions.' "*Id.* at 1347 (quoting *Regents of U. of Mich. v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985)). The basis for distinction between school elections and governmental elections, the court held, is one of purpose: "[T]his is a university, whose primary purpose is *education*, not electioneering." *Id.* at 1346 (emphasis in original).

The *Welker* court found the reasoning of *Alabama Student* inapposite, stating that the *Alabama Student* court based its decision on the " right ... to make academic judgments as to how to best allocate scarce

resources.' "*Welker*, 174 F.Supp.2d at 1063 (quoting *Alabama Student*, 867 F.2d at 1345). No such considerations are presented in a campaign finance case, the court reasoned, so *Alabama Student* should not apply. *Id.* at 1063-64.

However, the *Alabama Student* court did not, contrary to the *Welker* court's view, base its decision on the university's need to allocate scarce resources.[FN2] Rather, the court culled the allocation reference from *Widmar* as one example of when and why courts should defer to universities' academic judgments. *See Alabama Student*, 867 F.2d at 1345. Indeed, *Widmar* was just one of several Supreme Court cases cited, and relied upon, by the Eleventh Circuit in *Alabama Student*, including *Hazelwood*, *Bethel* and *Tinker*. *See id.* at 1345-47. The court based its decision upon the principles these cases collectively elucidate: a state university may, in the interest of preserving the quality and availability of educational opportunities for its students, place reasonable restrictions on free speech that would be impermissible outside of the academic environment. *See id.* at 1347 ("In the present case, and in other school cases raising ***1220** similar First Amendment challenges, these principles translate into a degree of deference to school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission."). Here, the rule on spending limits not only levels the playing field, it makes the political field open to all students regardless of financial status. While not every university student chooses to participate in the educational opportunity student politics affords, the rule ensures that the occasion is not lost to the vicissitudes of student prosperity.

FN2. Even assuming a university's right to allocate scarce resources was the basis of the *Alabama Student* decision upholding the election regulations, it would not be inapplicable to this case. The ASUM senate, the body to which Flint sought election, consists of twenty senators. Thus, the educational opportunity offered by ASUM senate participation is limited to twenty students per year in a university with enrollment well in excess of 10,000. The university seeks to ensure equal access to that opportunity through its campaign spending restriction.

Participation in student government falls within the University's educational mission by instructing students on many aspects of the governmental process. Article 2, § 1 of the ASUM Constitution provides the avowed educational charge and policy of ASUM: "ASUM is organized exclusively for educational and non-profit purposes." ASUM is, and has always been, intended as a learning experience for students. *See e.g.* Decl. of Hayden Ausland PP 3-8 (describing ASUM's history and its current and historical stature as an educational opportunity). For instance, in his declaration, Hayden Ausland, ASUM's senior faculty advisor for the past 14 years and professor in Classics, details the learning experiences ASUM participation provides: ASUM offers students experience in many forms of leadership, through which they develop a variety of skills to handle the responsibilities that arise in student government. ASUM senators and executives learn how to address conflicting interests of diverse constituencies, how to make recommendations about

the allocation of budgetary resources, how to negotiate with administrators over matters such as tuition and fee increases, and how to draft policies and priorities for numerous student programs.

Id. P 6. Current ASUM President Gale Price, who previously served as Vice President, describes her own participation as strengthening her decision-making skills, teaching her how to work for the good of the University closely aside people with whom she often disagrees, and providing her with leadership experience. Decl. of Gale Price P 6.

Additionally, all ASUM executives and senators attend seminars during the fall semester. ASUM Bylaws art. II, §§ 2(D) & 3(D). The substance of these classes include topics such as parliamentary procedure, service learning and leadership skills. Ausland Decl. P 7. Along with classes, participation in ASUM requires students learn how to conduct themselves in accordance with Robert's Rules of Order, *see* ASUM Const. art. 4, § 7, an education on how to bring order to the sometimes chaotic debating and voting lost on many of today's aspiring public servants. The learning and experience gained by ASUM participation is integral to participants' education.

ASUM is a learning opportunity provided students as part of the University of Montana's educational mission.[FN3] ASUM's ***1221** role as an educational opportunity means the application of the reasonableness standard of review to the regulations is appropriate and explains why the student spending limits are not subject to the same standard as regulations imposed on candidates running for national or state offices.[FN4]

Thus, ASUM regulations are subject to a reasonableness standard.

> FN3. Professor Hayden Ausland notes the educational opportunity service in student government provides for those wishing to pursue a career in public service. Ausland Decl. P 8. In doing so, he points to the successes of past ASUM members such as former U.S. Senator Lee Metcalf, former University of Montana President Robert Panzer, and former Montana Attorney General Joe Mazurek. *Id.* One cannot question that participation in ASUM provides excellent preparation for such careers in public service but, as Professor Ausland remarks, "it is not yet that career itself." *Id.*

> FN4. As Defendants point out, "Unlike ASUM, neither Congress nor the Montana Legislature exists to further the education of persons elected to serve there (even if that may be an incidental effect in some cases)." Def.'s Br. Opposition to Pl.'s Mot. for Prelim. Inj. 9.

C. Reasonableness of ASUM's Student Campaign Spending Restrictions.

According the deference due the University's academic decisions regarding access to its educational opportunities, *see* *Widmar*, 454 U.S. at 276-77, 102 S.Ct. 269, I cannot say ASUM's campaign spending restrictions are unreasonable. As the declarations in this case make clear, ASUM's expenditure regulations are an effort by the University to assure that all students, regardless of personal or financial circumstances, have equal

access to the educational opportunities ASUM participation provides. *See e.g.* Austen Decl. P 9. Without some spending limits, financially able students have an advantage in attaining the learning experience of ASUM participation, *see* Price Decl. P 6.

Guaranteeing that students need not have substantial personal resources to have a fair opportunity to run for, and win election to, ASUM appears particularly important at the University of Montana. Over two-thirds of the student population at the University of Montana receive financial aid, including three-quarters of in-state students. Decl. of Myron Hanson P 6. Additionally, in 2002-03, 34% of undergraduates received Federal Pell Grants, which only the most financially needy students may obtain. *Id.* P 4. According to the Director of the University's Financial Aid Office, these percentages exceed most flagship public universities in the U.S. *Id.*Consequently, these students with limited financial resources are less likely to have access to the educational experience ASUM participation provides.

Rendering student government an educational opportunity for only those students who can afford to run, *see* Price Decl. P 6, is contrary to a university's educational mission. Professor Ausland adeptly explains this diametric contradiction: "To allow a wealthy student to monopolize access to election would be like allowing that same wealthy student a first shot at enrolling in some sought-after history class ... it would be unworthy of an American institution of public higher education." Ausland Decl. P 9.

To paraphrase an argument of Seth Waxman, counsel

for the defendants in *McConnell v. FEC*, 539 U.S. 981, 124 S.Ct. 33, 156 L.Ed.2d 693 (2003), if we reach the stage where participation in student government is perceived as only given to those interests with large money contributions, the fundamental predicate of student governance breaks down. When the cynicism of wealth invades the academy, students learn not the lessons of orderly governance but instead are imbued with the anti-egalitarian notion that wealth is power.

Overall, ASUM's spending restrictions are a reasonable attempt to maintain equal access to the pedagogical benefits of ASUM participation throughout the student body.

*1222 IV. CONCLUSION

Because ASUM's campaign expenditure restrictions are reasonable in light of ASUM's educational purpose, they do not violate Flint's First Amendment free speech rights.

Accordingly, it is HEREBY ORDERED:

1. Defendants' Motion to Dismiss (**Dkt. # 66**)converted to Rule 56 Motion for Summary Judgment is GRANTED;

2. Judgment shall be entered for Defendants and all other pending motions shall be DENIED as moot.

END OF DOCUMENT

[Filemarked July 13, 2007]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON FLINT, Plaintiff-Appellant v. GEORGE DENNISON, in his official capacity as President of the University of Montana-Missoula (UMT); et al., Defendants-Appellees, and GALE PRICE, President; et al., Defendants.	No. 05-35442 D.C. No. CV-04-00085-DWM District of Montana, Missoula ORDER

Before: GRABER, PAEZ, and BEA, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for an en banc rehearing and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

U.S. Const. amend. I (in relevant part)

Congress shall make no law . . . abridging the freedom of speech[.]

ASUM CONSTITUTION

Approved by ASUM Central Board
December 2, 1987

Approved by ASUM Student Membership
February 5, 1988

ARTICLE 1 NAME AND MEMBERSHIP

Section 1. The name of this organization shall be the Associated Students of the University of Montana.

Section 2. For the purposes of this Constitution, member shall be defined as any Student Activity Fee paying student of the University of Montana.

Section 3. For purposes of this Constitution, student shall be defined as anyone currently enrolled in The University of Montana.

* * * *

ARTICLE 7 ELECTIONS

Section 1. Only members as defined by Article I of

this Constitution are eligible to hold or run for any elective or appointed position in the Association, except for certain initiatives defined in this Constitution. All students registered for one credit or more are allowed to vote in any ASUM election. In order to hold any elective or appointed position, a member must be in good standing, which is defined as maintaining a 2.0 cumulative grade point average. No person shall hold or be a candidate for any two of the ASUM elective positions listed in Article 4, Section 2 at the same time.

Section 2. Elective procedures shall be enumerated in the Bylaws.

Section 3. Senators and Executives of the Association shall be elected during the General Elections as specified in the ASUM House Rules.

Section 4. Election to ASUM Senate and Executive office shall require:

(a) Members of the Association may file for candidacy by petitions signed by fifty (50) registered students.

(b) The Senate will be composed of twenty (20) candidates who receive the largest number of votes in the ASUM General Elections.

(c) The term of office for Senators and Executives shall extend from two weeks after the General Election until two weeks after the following year's General Election.

2003 Legislature
ASUM BYLAWS
Updated 04/17/04

ARTICLE I - MEMBERSHIP

Section 1. Definition of Membership: All students enrolled at The University of Montana who have paid the student activity fee for the current semester are ASUM members.

Section 2. Any member of the Association is entitled to vote, run for office (upon meeting qualifications) and to exercise the various rights and privileges of membership.

Section 3. The Activity Fee shall be assessed to all students registered for seven (7) or more credits during the fall and Spring Semesters. A reduced Activity Fee is assessed during the Summer Session.

Section 4. Students who have arranged with the University Controller's Office for temporary deferment of the student activity fee are active members of ASUM, as long as their fee status is satisfactory with the Controller's Office.

* * * *

ARTICLE IV - COMMITTEES AND BOARDS

Section 1. General.

A. Each committee shall have general jurisdiction over its assigned function.

B. Members of all boards and committees shall be appointed at the beginning of Fall Semester, although additional appointments may be made at any time.

C. Each standing committee and board, as enumerated in the Constitution and/or Bylaws, shall have the option to adopt rules of procedure for its own actions, as an aid to the Constitution and Bylaws, and shall be applicable only to the committee or board that adopts them. Individual rules of procedure shall have no effect when being considered by the Senate, unless the Senate has also adopted the rule or procedure.

D. Any committee member absent from three (3) or more meetings of one committee per semester without an excuse from either the committee chair or the Vice President shall be deemed to have resigned from that committee or board.

E. The Senate may remove the chair or member of any committee by a two-thirds (2/3) majority vote.

F. The President may establish new committees upon simple majority approval of the Senate.
G. All chairs and members of committees and boards shall be recommended by the President, in consultation with the Vice President, and confirmed by the Senate by a two-thirds (2/3) majority vote.

H. A quorum for all committee meetings shall be defined as a simple majority of the members of that committee currently holding positions on that com-

mittee.

I. Committee Chairs are responsible for setting the order of business and running their committee meetings. Unless their vote is needed to maintain a quorum, or is otherwise precluded in ASUM policies, committee chairs may vote only in case of a tie.

J. All approved actions of University Center Executive Board, SPA and Board on Budget and Finance may be forwarded to the next ASUM Senate meeting as a seconded motion, a seconded motion meaning that a resolution need not be submitted under New Business and after one week be debated under Old Business.

K. All ASUM committees shall meet at least once every four weeks of the academic year unless exempted by the Vice-President. The chair of the committee is responsible for contacting members of the committee, establishing a meeting time and location. The only committee exceptions to this are Constitutional Review Board, Elections Committee, and Interview Committee, which shall meet on an "as needed" basis.

Section 2. ASUM Relations and Affairs Committee:

A. The ASUM Relations and Affairs Committee shall be composed of eleven (11) members, five (5) of which shall be Senators. An ASUM Senator shall chair ASUM Affairs and Relations Committee.

B. The ASUM Relations and Affairs Committee shall be responsible for recommending all changes to the ASUM Bylaws and ASUM Personnel Policy.

C. The ASUM Relations and Affairs Committee shall

work on unbiased projects, ideas, or campaigns intended to increase student involvement in and student awareness of ASUM government in general or any particular issue(s) pertaining to ASUM.

D. The ASUM Relations and Affairs Committee shall enforce and oversee the execution of Article III, Section 2E and Section 2F of the ASUM Bylaws. Therefore, a motion passed by a two-thirds majority vote in the ASUM Relations and Affairs Committee can and will result in an unexcused absence for an ASUM Senator failing to accord with Article III, Section 2E or Section 2F of the ASUM Bylaws. Such decisions of the ASUM Relations and Affairs Committee may be repealed by a simple majority vote of the ASUM Senate.

E . The ASUM Relations and Affairs Committee shall also oversee the functions of the following ASUM executive agencies, in accordance with ASUM Personnel Policy:

1. UM Productions. The UM Productions Director shall be appointed by the President and approved by the Senate by a two-thirds (2/3) majority vote.

2. ASUM Legal Services - ASUM Relations and Affairs shall act as a board of directors to oversee the Legal Services Director and its program.

3. ASUM Administration

4. The Student Resolution Officer shall be appointed by the President and approved by a two-thirds majority vote of the Senate.

E. Student directors may be removed from office as stipulated by University of Montana policy and ASUM Personnel Policy.

* * * *

Section 4. Board on Member Organizations:

A. The Board shall be composed of five (5) members, of whom three (3) shall be members of the Senate and two (2) shall be students-at-large.

B. The Board on Member Organizations shall review all applications for groups and organizations that wish to register with ASUM and/or receive ASUM funding. Groups meeting recognition requirements will be forwarded to the ASUM Senate to be approved by a two-thirds (2/3) majority vote. This process shall occur after the second week of Fall Semester and continue throughout the school year. Recognition by ASUM will be valid, after recommendation by the Board on Member Organizations and subsequent two-thirds (2/3) vote of the ASUM Senate, until the beginning of the next Fall Semester. At that time, all groups must re-submit their recognition files to register with ASUM. Those groups, which were budgeted funds during the previous year, will continue to be allowed access to these funds during the recognition process unless their recognition is suspended or revoked. Any budgeted groups who do not re-register for ASUM recognition will not be allowed access to their ASUM account funds.

1. All groups requesting to participate in ASUM budgeting must return their fully completed recognition files to the Board on Member Organizations by the first Friday of Spring Semester to be considered for budgeting. Any group having discrepancies in their file that would prevent recognition must correct the problems completely before the third Friday of Spring Semester to still be eligible for ASUM budget-

ing.

2. No group returning its recognition file after the first Friday of Spring Semester will be allowed to participate in ASUM budgeting that school year.

C. If the Board has evidence that a group has failed to comply with the stated criteria necessary for ASUM recognition or has failed to meet all the responsibilities stipulated by ASUM, the Board has the option of sending a warning notice to the group specifying reasons for the warning and the corrective steps that must be taken within a period of no more than one month. The group shall have the opportunity within one week to have an informal hearing with the Board on Member Organizations. If the group fails to act, or the Board feels that the matter has not been resolved, the Board on Member Organizations shall have the option of issuing a second and final warning letter or recommending to the Senate that the group's recognition be revoked. The Board may choose to move directly to recommending to the Senate that the group's recognition be revoked without a warning letter if an infraction or negligence is viewed as substantial.

D. For any group whose registration is suspended or any group that is suspended, or any group that the Board has determined should have its recognition revoked, there shall be an appeals process. The process shall be as follows:

1. The group shall be given a hearing by the Board within one week of the notice of impending loss of ASUM recognition.

2. After the hearing, if the Board does not rescind its

decision, the group may present its case to the Senate during the Vice President's report.

3. The Senate, by a two-thirds (2/3) majority vote, shall have the opportunity to overturn a Board's recommendation to remove group recognition.

E. The general policy of ASUM is to require membership lists of its recognized organizations to be available and open for inspection by the public. This policy is to promote openness and to ensure that recognized groups and organizations are composed of ASUM members. Since ASUM recognized groups and organizations receive access to various University facilities and have the ability to apply for ASUM funding, verification of membership for ASUM groups is required. Any group not providing a complete list of membership will not be recognized by ASUM.

F. Any group seeking ASUM recognition that desires the confidentiality of its membership must apply to the Board on Member Organizations for confidentiality approval. The application should contain an explanation of the purpose of the group and the need for confidentiality. If the Board on

Member Organizations approve the request, the group must accomplish the following:

1. A copy of a membership list must be provided to the Board on Membership Chair. This list must be kept confidential by the Chair.

2. The Board on Membership Chair shall confirm with the Registrar the membership list is composed of at least 15 eligible members.

G. Presentation of a falsified list to an advisor or to

the Board shall be grounds for removal or denial of ASUM recognition. Re-recognition may occur only on approval of the Board and upon such additional conditions that the Board may set.

H. A group containing non-members may achieve recognition so long as its total membership is at least 85% ASUM members.

I. Officers of organizations seeking ASUM recognition must be ASUM activity fee-paying students.

* * * *

Section 6. Elections Committee:

A. The Elections Committee, as appointed by the President and approved by the Senate, shall hold, monitor, and arrange the yearly elections for the offices of President, Vice President, Business Manager, and Senators, and shall conduct referendums. In addition, the Elections Committee shall conduct special elections as required. The Elections Committee shall be conducted according to the rules contained in the current edition of Robert's Rules of Order.

B. The Elections Committee shall be composed of twelve (12) members, of which four (4) shall be members of the Senate, seven (7) shall be students at large, with the ASUM Student Resolution Officer acting as an ex-officio member..

C. No member of the Elections Committee shall be seeking an elected position within ASUM.

D. Elections Procedures shall be enumerated in ASUM Bylaws, Article V.

Section 7. Interview Committee:

A. The ASUM Interview Committee shall be composed of five ASUM Senators and two students at large, and an ASUM Senator shall serve as Chair of the Committee.

B. The Committee shall be responsible for interviewing and recommending individuals for positions within ASUM. This may include vacant Senate seats, agency directorships, classified positions, and any other positions that the Senate may approve to be within the scope of the Committee.

Section 8. Publications Board:

A. The Publications Board will consist of seven voting members, chaired by the ASUM Business manager, who votes only in case of ties. The Pub Board will include one ASUM Senator and one student-at-large position, the Kaimin Editor, Business Manager, and Faculty Advisor, and a Business School faculty member appointed by the Dean of the Business School, who will be voting members of the Board.

B. The Board shall be responsible for appointing the Editor and Business Manager of the **Montana Kaimin**. Additionally, the Board shall appoint the Editor and Business Manager of Cutbank and any other ASUM-funded student publications.

C. The Board shall oversee the general operations of ASUM-funded publications, without infringing on First Amendment rights.

Section 9. Student Political Action Committee (SPA):

A. The Student Political Action Committee shall consist of 12 members, of whom five shall be members of the ASUM Senate, and six shall be students-at-large. The other position shall be occupied by the SPA Director. The Committee shall be chaired by an ASUM Senator.

B. The ASUM Office of Student Political Action shall be composed of one SPA Director.

C. The SPA Director and the ASUM lobbyist shall be appointed by the President and approved by the Senate by a two-thirds (2/3) majority vote.

Section 10. University Center Board

A. University Center Board shall consist of 9 members; three members who shall be subject to appointment by the President of the University, each serving three-year rotating terms, and five members who shall be recommended for appointment by the ASUM President, subject to a two-thirds (2/3) vote of the Senate. Of the five Board members appointed by ASUM, two shall be ASUM Senators serving one-year terms. The three student-at-large positions shall serve two-year rotating terms. The University Center Director or his/her designee shall serve as an ex-officio non-voting member of the UC Board. An ASUM Senator shall chair the Committee.

B. A quorum shall normally consist of five members of the Board.

C. The Chair shall act for the Board in its absence, subject to its review.

D. Special meetings may be called by the Chair or by two or more members.

E. Duties and functions of University Center Board shall include:

1. To provide advice and oversight about University Center policies, activities, and staffing;

2. Annually review, according to the UC Board Strategic Planning Budget Guidelines, the University Center budgets and fees, including, but not limited to, the Annual Operating Budget, Auxiliary Capital Fund, and UC Repair and Replacement account;

a. University Center budgets shall consist of the three years' previous actual figures with itemized line items for each expense and revenue.

b. University Center budgets shall also include proposed figures of the current academic year.

c. University Center budgets shall also contain the proposed figures of the upcoming academic year.

d. The University Center Board shall receive the budgets by December 1 for adequate time to analyze the budget.

3. Ensure that student, faculty, and staff interests are considered in deciding policies and other administrative matters involving the UC by helping the UC Administration to decide on these matters;
4. In consultation with the UC Administration, develop long-range planning goals and funding sources for UC development and use.

* * * *

Section 16. Student Radio Station:

A. The Radio Board shall be composed of seven members, chaired by an at-large student, who may make or break a tie. The other six members shall consist of

the General Manager of the Student radio station, a faculty member of the Radio Television Department chosen by the chair of the Department, a student at-large, one DJ elected annually by the DJs, an ASUM Senator, and the Director of the Department of Information and Technology or designee. Students shall be appointed and serve pursuant to the ASUM Constitution and Policies.

B. A quorum shall normally consist of four members of the Board.

C. The Board shall be responsible for the yearly appointment of the General Manager. The Board shall also be responsible for approving the General Manager's recommendations for positions listed in Item 4.60 of Personnel Policy.

D. The Board shall oversee the general operations of the student radio station. This shall include approval of all major format or structural changes, as well as approval of the student radio budget to be submitted by the General Manager on a yearly basis.

ARTICLE V - ELECTIONS

Section 1. Eligibility:

A. Members may seek office within these guidelines:

1. Any member as defined in Article I, Section 2 of the Constitution is eligible to run for any office.

2. A potential candidate must file a petition with the Elections Committee. Petitions are available from the Elections Committee and must consist of the signatures, printed names, ID numbers, and telephone numbers of at least 50 members registered during Spring Semester of the election. A student political party may present a slate of potential candi-

dates for any or all elective positions upon petition of at least 50 students, registered during Spring Semester of the election, per potential candidate. The names of all potential candidates who are members of parties must be named on the petitions for that party. Potential candidates for President must run with a potential candidate for Vice President as a single ticket, with a joint petition containing at least 100 signatures.

3. The names of all candidates shall be published in the Montana Kaimin immediately after the validation of petitions by the Elections Committee. The names of the winners of a primary election, if one is held, shall be published immediately following the election. Notices of special elections shall be conspicuously printed in the Montana Kaimin at least four times before the elections, including two issues immediately preceding the election.

4. Any member as defined in Article I, Section 2 of the Constitution is eligible to run as a write-in candidate. Write-in candidates shall not be printed on any ballot or participate in any ASUM-sponsored pre-election activities. Write-in candidates must adhere to the same campaigning and budget restrictions as recognized candidates. Write-in candidates need not be recognized by the Elections Committee.

Section 2. Campaigning:

A. Campaigning is defined as any activity which directly or indirectly promotes the candidacy of one or more individuals for an office. This includes, but is not necessarily limited to, scheduling appearances, the buying of votes with money, gifts, or alcohol, posting or publishing advertisements, distributing

literature, or lobbying a voter.

B. No campaign materials may be displayed before the start of the campaigning period. Posting signs for place-holding before the start of campaigning is not permitted.

C. Campaigning through speech or signs within the immediate polling sites on the days of primary and general elections is not permitted. Posters must be removed on the floor level of the designated polling sites, including the atriums of the University Center. Failure to remove campaign materials from non-polling sites is not considered a violation.

D. The Elections Committee shall sponsor at least two forums: one for the Senate candidates, and one for the officer candidates, plus one Presidential-Vice Presidential debate following the primary, if there is one.

E. No door-to-door campaigning is permitted in the residence halls or family housing. Campaigning is permitted elsewhere on campus, including the Lodge and classrooms with permission of the professor.

F. Posters may be placed on campus according to these rules:

1. General Buildings: Only on appropriate postering areas.

2. Residence Halls: Only on appropriate bulletin boards or dorm doors and windows with the approval of the dorm resident. All posters must be approved by the residence hall office.

3. University Center: Must be approved by the University Center office. Posters may be placed only on bulletin boards and interior glass surfaces. Banners

will be allowed only inside the University Center.

4. Outdoors: Only on kiosks.

5. No posters may be put on exterior doors of any building on campus.

G. Campaign expenditures, including donations, by each candidate or write-in candidate shall be limited to these amounts:

1. President-Vice president team: The maximum expenditure allowed is $100.

2. Business Manager: The maximum expenditure allowed is $100.

3. Senators: The maximum expenditure allowed is $100, with or without a primary election. For parties of three or more candidates, the maximum amount allowed is $200. This requirement also holds for officer candidates. For example, if an officer candidate and two or more Senate candidates formed a party, their expenditures would be limited to $200.

4. Candidates may choose to be reimbursed for campaigning expenditures to the amount of $10, dependent upon receipts following the General Elections. Expenditures exceeding $10 will be matched 50% by ASUM. Total ASUM contributions shall not exceed $50 for Senate and Business Manager candidates, $75 for President/Vice President candidates, and $100 for slates. All claimed expenditures for reimbursement must have receipts. Expenditures without receipts will not be matched by ASUM.

5. All contributions to ASUM candidates must be from students. Money from corporations and Political Action Committees is strictly prohibited.

H. Each candidate, write-in candidate, candidate

team, or party must document expenditures for the Elections Committee and made public by filing an expenditure form, complete with receipts, by 3 p.m. two days prior to the general election. Expenditure forms must be filed even if there are no expenditures.

I. No ASUM sponsored organization shall be allowed to finance the campaign of any candidate for ASUM office, nor may any individual finance the campaign of a candidate in the name of an ASUM-sponsored organization.

[Filemarked August 3, 2004]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

AARON FLINT, *Plaintiff,* v. George Dennison, in his official capacity as President of the University of Montana-Missoula ("UMT"), the Associated Students of the University of Montana ("ASUM"), Kyle Engelson in his official capacity as the ASUM Elections Committee Chair, Justin Baker, Averiel Wolff, Sophia Alvarez, Anna Green, Kris Monson, Derek Duncan, Katie Boeckx in the official capacities as Elections Commissioners for the Associated Students of UMT, *Defendants.*	Cause No. CV-04-00085-M-DWM **Affidavit of Aaron Flint in Opposition to Defendants' Motion for Dismissing Amended Complaint**

I, Aaron Flint, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am over eighteen years of age, and the information contained in this affidavit is based *2 on personal knowledge.

2. During the 2004 elections of the Associated Students of the University of Montana ("ASUM"), posters criticizing me were placed on the UMT campus. The example attached as Exhibit A is a true and accurate copy of one poster that was used. To the best of my information and belief, hundreds of these and/or similar posters were placed on campus. They were

placed all over campus but most heavily in the campus' large Liberal Arts building. In some cases two oversized posters were placed in a single classrooms.

3. To the best of my information and belief, leaders from leaders from Montana Public Interest Research Group ("MontPIRG") and the University of Montana College Democrats placed most, if not all, of these posters.

4. Some students thought that the posters were mine and that I was wasting money on ads that made no sense, and others that I was making a joke out of the campaign by placing them. I contacted the school newspaper, the Montana Kaimin, via unreturned phone calls to the editor and an unpublished letter to the editor, in hopes of explaining to the UMT student body who was responsible for the posters. To my knowledge, no disclaimer or attribution was ever made regarding those placing the posters.

5. I had to compete with these ads, meaning I had to spend more than any other student to get my message out.

6. The effect of the ASUM spending limits is to allow unlimited undisclosed third party political speech while limiting candidates' ability to respond or counter it. Students who are supported by such groups can rely on them for support, while students unsupported by such groups, those with a minority voice, cannot compete with them because their spending is limited. I believe the spending limits therefore limit diversity in student government. *3

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowl-

edge, information, and belief.

Executed on July 26, 2004

/s/ Aaron Flint

Aaron Flint

Affidavit of Aaron Flint